



BILLING CODE: 3510-DS-P

DEPARTMENT OF COMMERCE

International Trade Administration

19 CFR Part 351

RIN Docket No.: 0625-AB04

Docket No.: 150731663-5663-01

Dates of Application of Amendments to the Antidumping and Countervailing Duty Laws Made by the Trade Preferences Extension Act of 2015.

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce

ACTION: Interpretive Rule; Notice of Determination

SUMMARY: On June 29, 2015, President Obama signed into law the Trade Preferences Extension Act of 2015. The Act provides a number of amendments to the antidumping duty (“AD”) and countervailing duty (“CVD”) laws but does not specify dates of application for those amendments. This notice of determination establishes a date of application for each statutory revision pertaining to the Department of Commerce and provides notice thereof to all interested parties to AD and CVD proceedings and to the public.

DATES: The date of application of this interpretive rule is [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

FOR FURTHER INFORMATION CONTACT: Robert Heilferty, Deputy Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, 1401 Constitution Ave., NW, Washington, DC 20230, 202-482-0082.

SUPPLEMENTARY INFORMATION:

Background

The Trade Preferences Extension Act of 2015, Public Law 114-27 (the “Act”) provides five amendments to the AD and CVD laws: (1) Section 502 amends Section 776 of the Tariff Act of 1930, 19 U.S.C. 1677e, to modify the provisions addressing the selection and corroboration of certain information that may be used as facts otherwise available with an adverse inference in an AD or CVD proceeding; (2) Section 503 amends Section 771(7) of the Tariff Act of 1930, 19 U.S.C. 1677(7), to modify the definition of “material injury” in AD and CVD proceedings; (3) Section 504 amends Section 771(15) of the Tariff Act of 1930, 19 U.S.C. 1677(15), and Section 773 of the Tariff Act of 1930, 19 U.S.C. 1677b, to modify the definition of “ordinary course of trade” and the provisions governing the treatment of a “particular market situation” in AD proceedings; (4) Section 505 amends Section 773(b)(2) of the Tariff Act of 1930, 19 U.S.C. 1677b(b)(2), to modify the treatment of distorted prices or costs in AD proceedings; and (5) Section 506 amends Section 782(a) of the Tariff Act of 1930, 19 U.S.C. 1677m(a), to modify the provision regarding accepting voluntary respondents in AD and CVD proceedings.

The Act does not contain dates of application for any of these amendments. As explained below, it would be impracticable for the Department to apply at least one of the amendments, Section 505, immediately, and extremely difficult to apply the others immediately. Accordingly, the Department is establishing dates of application for each section, except for Section 503 (which relates to determinations of material injury by the U.S. International Trade Commission).

As an initial matter, we are cognizant of the Supreme Court’s ruling in *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), that, absent clear Congressional intent that a statute be applied retroactively, a statute may not attach new legal consequences to events completed before its

enactment. *Landgraf*, 511 U.S. at 280; *see also*, *AT&T Corp. v. Hulteen*, 556 U.S. 701 (2009).

In determining whether the *Landgraf* prohibition has been breached, important considerations are whether the new law takes away or impairs vested rights or creates new obligations, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past. *Landgraf*, 511 U.S. at 269. Another important consideration is whether the prior provision was reasonably relied upon, so that application of the new provision would be manifestly unfair. *INS v. St. Cyr*, 533 U.S. 289 (2001).

In considering whether application of the amended statutes to merchandise entered into the United States before the passage of the Act would disturb vested rights, create new obligations or upset a reasonable reliance, our starting point is the holding of the Supreme Court in *Buttfield v. Stranahan*, 192 U.S. 470, 493 (1904), that “no individual has a vested right to trade with foreign nations . . .” and that importing merchandise is not a fundamental right that is protected by other constitutional privileges such as due process. *See also NEC Corp. v. United States*, 151 F.3d 1361, 1369 (Fed. Cir. 1998). More specifically, the Supreme Court held in *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 318 (1933), that no party has a legal right to a particular rate of duty.

It follows that, even assuming that one or more of the Act’s amendments were to result in a higher rate of duty being applied to imported merchandise than otherwise would have been applied, application of that higher rate would not disturb a vested right, attach a new disability to transactions or considerations already past, or upset any legitimate expectation. In other words, the Act does not attach any “new” legal consequences to past events, because those events had no settled legal consequences to begin with and, therefore, created no legitimate expectations

concerning duty rates. As the Court of Appeals for the Federal Circuit (“Federal Circuit”) recently observed in *GPX Int’l Tire Corp. v. United States*, 780 F.3d 1136, 1144 (Fed. Cir. 2015) “[a]lthough trade duties are forward-looking in part, the government also has a clear interest in fashioning a remedy for damaging past acts, ‘level[ing] the playing field for particular American manufacturers,’ and ‘remedy[ing] the harm American manufacturers and their workers experience as a result of unfair trade practices’” (quoting *Guangdong Wireking Housewares & Hardware Co. v. United States*, 745 F.3d 1194, 1206 (Fed. Cir. 2014)).

Other decisions of the Federal Circuit are in accord. In *Parkdale Int’l v. United States*, 475 F.3d 1375 (Fed. Cir. 2007), the Federal Circuit ruled that the application of the Department’s new policy for resellers sales that preceded the announcement of that change in policy was not impermissibly retroactive. The Federal Circuit based its decision primarily on the fact that, under the U.S. system of duty assessment, final duty liability is not set until the entries of the imported merchandise are liquidated, which is often many years after the date of entry. *See, e.g.*, 19 U.S.C. 1675(a)(2)(C). Thus, importers bring goods into the United States with full knowledge that the rates of estimated duties deposited with U.S. Customs and Border Protection upon importation may change. In *Travenol Labs., Inc. v. United States*, 118 F.3d 749, 753-54 (Fed. Cir. 1997), the Federal Circuit ruled that the application of an amendment to customs law that changed the time period in which interest was calculated for overpayment of duties to goods that entered the United States prior to enactment of the law was not impermissibly retroactive.

Many decisions of the Court of International Trade agree. In *GPX Int’l Tire Corp. v. United States*, 893 F. Supp. 2d 1296, 1314 (Ct. Int’l. Trade 2013), the court observed that “customs duties are to an extent unique from other government assessments in that there is no

right to import, and where unfair trade remedies apply those with goods that may be imported rarely can predict with accuracy what the duty will be [referencing *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 318 (1933)]. For example, when goods become the subject of an AD/CVD investigation, liquidation is suspended while the initial investigation is undertaken, and generally while a review is conducted, prior to a final rate determination and duty assessment. *See Parkdale Int'l v. United States*, 475 F.3d 1375, 1376-77 (Fed. Cir. 2007).” Similarly, in *Yamani Fishing Net Co. v. United States*, 830 F. Supp. 1502, 1507 (Ct. Int’l Trade 1993), the Court ruled that the application of a new regulation creating additional requirements for the submission of information to Commerce to a segment of an AD proceeding initiated before the promulgation of that regulation was not impermissibly retroactive.

Based on these precedents, we have determined that implementing these statutory amendments immediately, including to merchandise which entered into the United States before the passage of the Act, would not be impermissibly retroactive. In determining dates of application, therefore, we have been guided by Congress’s intention that each amendment be implemented as soon as practicably possible. Accordingly, we have determined the earliest date at which each amendment practicably could be implemented and established that date as the date of application of that particular revision to the statute. This approach results in individual dates of application for different provisions of the Act, as explained below.

Section 502 of the Act amends Section 776 of the Tariff Act of 1930, 19 U.S.C. 1677e, to revise the provisions addressing the selection and corroboration of certain information that may be used as an adverse inference in applying facts available in an AD or CVD proceeding. These amendments provide that the Department may rely on, and is not required to adjust, certain

information used as an adverse inference in applying facts available in an AD or CVD proceeding. They do not impose any new requirements on the parties to such proceedings that would require them to submit additional information or argument. Accordingly, we will apply this provision to determinations made on or after [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

We note that Section 502 provides that, in making AD and CVD determinations on the basis of the facts available, the Department is not required to corroborate, in certain circumstances, the information employed, to make certain estimates or demonstrations concerning that information, or to address certain claims regarding the “alleged commercial reality” of non-cooperating parties. Because this section addresses the Department’s discretion and, thus, does not require the Department to take any specific actions with respect to facts available determinations, it will be applied to determinations made on or after [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Although the amendment does not interfere with the operation of 19 CFR 351.308(d), the Department intends to consider whether to amend that regulation as a result of the amendment to the statute.

Section 504 of the Act amends Sections 771(15) of the Tariff Act of 1930, 19 U.S.C. 1677(15), and Section 773 of the Tariff Act of 1930, 19 U.S.C. 1677b, to modify the definition of “ordinary course of trade” and the provisions governing the treatment of a “particular market situation” in AD proceedings. Because this section codifies the Department’s discretion and does not require the Department to take any action with respect to particular market situations, we will apply this provision to determinations made on or after [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. The Department’s regulation, 19 CFR

351.301(c)(2)(i), establishes a deadline for “particular market situation” allegations of “10 days after the respondent interested party files the response to the relevant section of the questionnaire, unless the Secretary alters this time limit.” The amendment does not require the alteration of this deadline, and so the regulation will continue to apply as before.

Section 505 of the Act amends Section 773(b)(2) of the Tariff Act of 1930, 19 U.S.C. 1677b(b)(2), to modify the treatment of distorted prices or costs in AD proceedings. It has two parts. Under the first part of the amendment of Section 773(b)(2) of the Tariff Act of 1930, 19 U.S.C. 1677b(b)(2), the Department will request constructed value and cost of production information from respondent companies in all AD proceedings. The Department recognizes that it cannot ask for such information in ongoing proceedings in which the time for doing so has passed. Accordingly, the Department will apply the new law to determinations in which the complete initial questionnaire has not been issued as of [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

The second part of Section 505 amends Section 773(c)(5) of the Tariff Act of 1930, 19 U.S.C. 1673b(c)(5), to permit the Department to disregard price or cost values without further investigation if it has determined that certain subsidies have existed with respect to those values, or if those price or cost values were subject to an AD order. This amendment clarifies the Department’s authority for its existing practice, and does not impose any new requirements on the parties to AD proceedings that would require them to submit additional information or argument. Accordingly, we will apply this provision to determinations made on or after [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

Section 506 of the Act amends Section 782(a) of the Tariff Act of 1930, 19 U.S.C.

1677m(a), to identify the factors that the Department may take into account in determining whether accepting voluntary responses would be unduly burdensome. This amendment compliments the Department's voluntary respondent analysis and does not require parties to AD and CVD proceedings to submit additional information or argument. Accordingly, we will apply this provision to determinations made on or after [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

CLASSIFICATION

Pursuant to 5 U.S.C. 553(b)(A), notice and comment are not required for this rule because its intent is to interpret the Trade Preferences Extension Act to apply as explained above and to provide notice to the public. This interpretation is meant to lend clarity to the statutory terms and will reduce or eliminate any possible confusion about the application of the Act without creating any new law, rights or duties. *See General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc) (finding that EPA's rule was interpretive because "the agency regarded its rule as interpretive"; "[its] entire justification for the rule is comprised of reasoned statutory interpretation, with reference to the language, purpose and legislative history of the [provision]"; and "most importantly, the rule did not create any new rights or duties..."). Because notice and an opportunity for comment are not required, no regulatory flexibility analysis is required and none has been prepared. The rule has been determined to be not significant for purposes of Executive Order 12866.

Ronald K. Lorentzen
Acting Assistant Secretary
for Enforcement and Compliance

July 31, 2015

[FR Doc. 2015-19353 Filed: 8/5/2015 08:45 am; Publication Date: 8/6/2015]